IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

[C113-198]
UNITED STATES OF AMERICA, *Respondent*,
v.
FERDINAND A. KERTESS and CHEMICAL MARKETING COMPANY, INCORPORATED, *Defendants*.

FERDINAND A. KERTESS, *Petitioner*.

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(CONSOLIDATED APPEALS)

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, FERDINAND A. KERTESS, respectfully prays that Writs of Certiorari issue to review the judg-

ments of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled cases on January 25, 1944 (R. 429-432), affirming four judgments of conviction in a criminal case in the United States District Court for the Southern District of New York, entered July 2, 1943 (R. 396-7), which said actions were consolidated for purposes of trial (R. 22) and for purposes of appeal (R. 412).

Questions Presented

The questions presented are:

1. Do the Export Control Laws (Act of July 2, 1940, 54 Stat. 714, 50 U. S. C. A. Appendix Sec. 701; Presidential Proclamation No. 2413, 5 Fed. Reg. 2467, 2469) authorize the promulgation of restrictions on exports to particular areas and the licensing of particular individuals to take part in export transactions, or, is it intended that only the materials specifically designated as essential for defense purposes are subject to license? When a license permitting the export of certain materials is duly issued to one person, who, for any reason, is unable to make the export, is it illegal for another person to complete the export shipment of the same materials embraced by the license?

2. Is it proper to permit a jury to presume the existence of the *corpus delicti* in a criminal case?

3. To what extent does the law require that an extrajudicial admission or confession, made after the commission of a Federal crime, be corroborated? Is it legally essential that the *corpus delicti* be established by substantial evidence independent of the admission or confession, as Federal Courts in some circuits hold, or, is it sufficient

if the corroboration tends merely to touch upon or support the admission or confession, as Federal Courts in other circuits hold?

4. What corroboration is required to support an admission or confession of some, but not all, of the elements of a Federal crime? If there is an admission or confession, relating to suspicious or incriminating facts which, of themselves, do not include the *corpus delicti* and the corroborating evidence merely supports such admission or confession, has the commission of a Federal crime been legally established?

5. Is a conviction proper if it is based upon an admission or confession corroborated by circumstantial evidence, which considered together, can be reconciled either with the hypothesis of guilt or innocence?

Statement

The petitioner, Ferdinand A. Kertess, was tried and convicted by a jury on four separate indictments, two of which charged the substantive crimes of exporting platinum-group metals without licenses in violation of the Export Control Laws (Title 50, U. S. C. A. Appendix § 701; Presidential Proclamation 2413, 5 Fed. Reg. 2467), and two of which charged conspiracy with named and unnamed defendants to export such metals in violation of the Federal Conspiracy Statute, Title 18, U. S. C. A. § 88.

The facts are discussed at length in the opinion below, and are only briefly referred to here. On July 2, 1940, the President, acting under the powers delegated to him by Congress (50 U. S. C. A. Appendix Sec. 701), issued a proclamation (Presidential Proclamation 2413, 5 Fed. Reg. 2467), establishing rules and regulations governing the ex-

port of certain materials in the interests of national defense, in which he prohibited the export *inter alia*, of platinum-group metals, except when authorized in each case by a license obtained from the Secretary of State. The regulations set forth in detail the procedure by which licenses were to be issued (5 Fed. Reg. 2469).

Petitioner was the sole stockholder of Chemical Marketing Co., Inc., a New York corporation engaged in the business of buying, selling and manufacturing chemicals. Acting for the interests of certain European customers (R. 293-294, Exhibits 23-25), he made arrangements and initiated proceedings, in which he remained undisclosed, to procure export licenses in the name of another for the shipment of fifteen (15) ounces of iridium, fifteen (15) ounces of rhodium and one hundred fifty (150) ounces of palladium, all platinum group metals, to a party named Barth, in Cali, Colombia. The applications were granted and licenses were duly issued by the State Department (R. 313-323). Subsequently, when the named licensee indicated his financial inability to purchase the said metals for export, the petitioner intervened, took posession of the licenses, purchased the metals and completed the export shipment. When the consignment reached Cali, Colombia, it was immediately forwarded to Santiago, Chile, and from thence to Rome, Italy. Upon the basis of these facts the petitioner was indicted and charged with the substantive crime of exporting platinum-group metals without licenses in violation of the Export Control Laws (R. 12) and with conspiracy to make such exportation (R. 13-16). For convenient reference, this transaction is referred to as the "Barth Transaction."

With respect to the other two indictments, referred to as the "Mueller Transaction," it appears that petitioner had purchased sixty ounces of rhodium, a platinum group

metal for his European customers before any restrictions on exports were in effect (R. 342-345). He exported this metal to Japan, but it was returned to him because of certain Japanese import restrictions. In the interim, the Export Control Laws were enacted and petitioner was obliged to keep the rhodium in his custody. On March 24, 1941, he was visited by a Mrs. Betty Mueller, who presented a letter of identification to him from his European customers, which directed him to deliver thirty-five of the sixty ounces of rhodium to her for special delivery (R. 352-3). This metal was delivered to her in New York City and she gave petitioner a receipt therefor (Exhibit 90, R. 350). Two days later, on March 26, 1941, Mrs. Mueller sailed as a passenger from New York on the S.S. "Magallanes" for Balboa, Spain. There is no oral or written proof that she had the thirty-five ounces of rhodium that was given to her by the petitioner when she sailed on that boat. In June, 1942, at the request of a Federal Internal Revenue agent who was auditing the books of petitioner's corporation, Chemical Marketing Company, Inc., in connection with income tax problems, petitioner made voluntary statements under oath explaining the circumstances by which he became possessed of the aforesaid sixty ounces of rhodium metal and the disposition that he made by delivery of the thirty-five ounces to Mrs. Mueller (R. 211-213, 352-353). These facts form the basis for petitioner's indictment on the charge of having committed the substantive offense of exporting thirty-five ounces of rhodium without a license in violation of the Export Control Laws (R. 17) and conspiracy to make such exportation (R. 18-20).

The petitioner was tried and found guilty on all four indictments and judgments were entered fining him the sum of $1,000 on each indictment and sentencing him to eighteen months' imprisonment on each indictment, the sentences

to run consecutively. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the four judgments of conviction were affirmed.

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the judgments of conviction.

2. In holding that the exportation to Barth, at Cali, Colombia, was unlicensed and constituted a violation of the Export Control Laws.

3. In holding that the evidence was legally sufficient to establish a conspiracy to make an unlicensed export to Barth at Cali, Colombia.

4. In holding that there was ample evidence from which a jury could infer the *corpus delicti*, exportation without a license, on the charge of exportation to the Continent of Europe in the "Mueller transaction."

5. In holding that the evidence was legally sufficient to establish a conspiracy to export to the Continent of Europe without a license in the "Mueller transaction."

6. In holding that the extra-judicial declarations or admissions of the petitioner were sufficiently corroborated by other evidence.

7. In holding that the *corpus delicti* was sufficiently established by the other evidence.

Reasons for the Allowance of the Writs

1. The nature, scope and purpose of the Export Control Laws, Act of July 2, 1940, 54 Stat. 714; Presidential Proclamation 2413, 50 U. S. C. A. Appendix Sec. 701, 5 Fed.

Reg. 2467, 2469, which prohibit the unlicensed exportation of certain materials, never have been, to the knowledge of petitioner, interpreted or construed in this Court. These laws concern matters of national importance and the decision below construes them in a manner which is inconsistent with the reasons underlying their enactment.

2. It has been fairly settled in Federal Courts that extra-judicial declarations, admissions or confessions must be corroborated by other evidence, but it is not clear or settled as to what extent the corroborative proof must go. Some Federal Courts hold that extra-judicial confessions or admissions are not sufficient to authorize a conviction unless corroborated by independent evidence of the *corpus delicti*. *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825; *Evans* v. *U. S.* (C. C. A. 10), 122 F. (2d) 461; *Gulotta* v. *U. S.* (C. C. A. 8), 113 F. (2d) 683; *Gregg* v. *U. S.* (C. C. A. 8), 113 F. (2d) 691; *Forte* v. *U. S.* (App. D. C.), 94 F. (2d) 236; *Ercoli* v. *U. S.*, 131 F. (2d) 354 (App. D. C.); *Tingle* v. *U. S.* (C. C. A. 8), 38 F. (2d) 573; *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581; *Martin* v. *U. S.* (C. C. A. 8), 264 F. 950; *Naftzger* v. *U. S.* (C. C. A. 8), 200 F. 494, whereas other Federal Courts hold that the corroborative evidence need not independently establish the *corpus delicti*, but any corroborating circumstances will suffice which merely touch upon the *corpus delicti* or, as some decisions hold, such corroborative proof which, in the Judge's opinion, will go to fortify the truth of the confession itself; *Anderson* v. *U. S.* (C. C. A. 6), 124 F. (2d) 58; *Jordan* v. *U. S.* (C. C. A. 4), 60 F. (2d) 4, certiorari denied, 287 U. S. 633; *Wynkoop* v. *U. S.* (C. C. A. 9), 22 F. (2d) 799; *Pearlman* v. *U. S.* (C. C. A. 9), 10 F. (2d) 460; *Daeche* v. *U. S.* (C. C. A. 2), 250 F. 566; *Bolland* v. *U. S.* (C. C. A. 4), 238 F. 529; *Flower* v. *U. S.* (C. C. A. 5), 116 F. 241; *Cohen* v. *U. S.* (C. C. A. 2), 288 F. 835; *U. S.* v. *Williams*, 1 Cliff. 5, 28, Fed. Cas. No. 16,707. An excellent discussion and review of many of

these decisions is to be found in the case of *Forte* v. *United States* (68 App. D. C. 111), 94 F. (2d) 236. In *Warszower* v. *U. S.*, 312 U. S. 342, 347, this Court stated that the rule as to the corroboration of confessions applies only to extra-judicial admissions made after the commission of a crime, but left unsettled the extent to which such corroboration should go. The Court below refers to this phase of the opinion of the *Warszower* case as dictum, and not necessarily applicable to admissions voluntarily made before the accused has been charged with crime (R. 426).

The uncertainty reflected by the conflicting rules in the several circuits on this question and the related question of whether the jury may properly infer the existence of the *corpus delicti* in a criminal case where the circumstantial evidence is remote and speculative, invites consideration by this Court to the end that the law may be clarified and settled for all the circuits.

WHEREFORE, petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in this case; and that the judgments and orders of said Circuit Court of Appeals may be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

FERDINAND A. KERTESS,
Petitioner.

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